No. 15852

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, A CORPORATION, APPELLEE

On Appeal from the United States District Court for the District of Oregon

REPLY BRIEF FOR APPELLANT

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In this reply brief, we discuss separately appellee's contentions on the three issues which are raised by this appeal: (1) whether the court below properly placed the burden on the United States to disprove the correctness of appellee's claims; (2) whether the undisputed evidence adduced by the Government established that the shipments were entitled to the land-grant rate; and (3) whether there was compliance with the condition in the export tariff that specific destination beyond Pacific Coast port of export be shown.

1. *The burden of proof.* In urging in our main brief (pp. 17-23) that the court below erroneously relieved appellee of the burden of proving the correctness of its claims against the United States, we pointed to the recent decision of the Supreme Court in *United States* v. *New York, New Haven & Hartford R. Co.*, 355 U.S. 253, as well as to *United States* v. *Missouri Pacific R. Co.*, 250 F. 2d 805 (C.A. 5). In the *New Haven* case, the Supreme Court expressly held: (1) that, before the enactment of Section 322 of the Transportation Act of 1940, "it was the carrier's duty to sustain the burden of proving the correctness of [its] charges" (355 U.S. at 256); (2) that the right conferred upon the United States in Section 322 "to deduct overpayments from subsequent bills was the carriers' own proposal for securing the Government against the burden of having to prove the overpayment in proceedings for reimbursement" (355 U.S. at 260); (3) that "the Government's statutory right of set-off was designed to be the substantial equivalent of its previous right to withhold payment altogether until the carrier established the correctness of its charges" (355 U.S. at 261); and (4) that, as a consequence, "the burden of the carrier to establish the lawfulness of its charges is the same under §322 as it was under the superseded practice" (355 U.S. at 262). In the *Missouri Pacific* case, this holding was relied upon by the Fifth Circuit in determining that the carrier had the burden of proof on the issue of the weight of a government shipment of airplane fuselages (the resolution of the conflicting claims on that issue being

essential to a determination as to the correctness of the carrier's charges).

Notwithstanding *New Haven*, appellee renews (Br. pp. 29-34) the contention it made in the court below that it did not have the burden of demonstrating that its charges on the shipments here involved were proper—that, instead, it was incumbent upon the Government to show that appellee was not entitled to recover the amount it claims. It appears to suggest that the Supreme Court's holding in *New Haven* has application only where the facts necessary to the resolution of the critical issue are within the peculiar knowledge of the carrier. It also argues that the burden of proof would have been on the Government in this case had the pre-payment audit procedure been still in effect when the transportation services were performed.

(a) The lack of merit to appellee's endeavor to limit the scope of the *New Haven* decision becomes plain from even a cursory reading of the Supreme Court's opinion. At no point did the Court either state or imply that its conclusion respecting the assessment of the burden of proof was based upon any consideration other than that Section 322 was not intended to change the long-established rule that carriers (in common with all other contractual claimants against the Government) must furnish evidence satisfactorily establishing their claims. If there were room for possible doubt in this regard, and we submit there is none, it would be totally dispelled by footnote 5 (355 U.S. at 256), quoted in part by appellee at page 32 of its brief. In that footnote, the Court

referred to the conflicting claims of the parties with respect to whether the information as to the availability of the ordered cars was peculiarly within the carrier's knowledge—but expressed no opinion itself on the merits of the respective positions. If the Court had thought that the matter was of relevance to the disposition of the cause (let alone of controlling importance), it obviously would have undertaken to resolve the disagreement either at that point or at some subsequent point in the opinion.

(b) There are at least two complete answers to appellee's endeavor (Br. pp. 32-34) to distinguish the *New Haven* case on the ground that the Government is here demanding "a special reduced rate" and that a party claiming a "peculiar right" must prove the facts entitling him to assert that right. In the first place, there is no basis for this characterization of the land-grant rate. At the time these shipments were made, that rate had long been a firmly established feature of the rail transportation of Government property. See *United States* v. *Powell,* 330 U.S. 238, 240-241, and cases there cited. Further, during World War II a substantial percentage, if not the overwhelming majority, of Government rail shipments were military or naval property moving for a military or naval use—with the result that the application of the land-grant rate was then the rule rather than the exception.

Appellee's argument is closely akin to that which the carrier unsuccessfully made in *Northern Pacific Ry. Co.* v. *United States,* 330 U.S. 248. As we noted in our main brief (p. 31), the carrier there—like

this appellee—pointed to the supposedly remedial character of Section 321(a) of the Transportation Act and urged that "it should be liberally construed so as to permit no exception [to the application of the commercial rate] which is not required." The Supreme Court's response [330 U.S. at 257] was a reference to the "familiar" rule, invoked in the past in construing the reduced rate conditions of land grant legislation, that "any doubt as to the meaning of a statute which 'operates as a grant of public property to an individual, or the relinquishment of a public interest' * * * should be resolved in favor of the Government and against the private claimant." The Court went on to note that Section 321(a) "was in essence merely a *continuation* of land-grant rates in a narrower category." [Emphasis supplied.]

Secondly, even if Section 321(a) could be regarded as conferring a "peculiar" right upon the Government, it is difficult to see how appellee's position would be advanced. Contrary to appellee's assertion (Br. p. 32), the Government has made no "demand" in this action. Rather, appellee is the claimant. Before the court below was *its* claim to public funds, grounded upon *its* theory that it had a contractual and statutory entitlement to the full amount of the bill *it* rendered the Government. Its obligation to show such entitlement perforce was precisely the same as the obligation of the carriers in the *New Haven* and *Missouri Pacific* cases to prove their right to the public monies which they claimed.

(c) There is no greater substance to appellee's assertion (Br. pp. 32-34) that the Government seeks

to require it to adduce evidence on matters as to which the Government was in exclusive possession of the relevant factual information. Certified copies of all the requisitions of the Soviet Government Purchasing Commission, pursuant to which the shipments had been made, were made available to appellee and were produced at the pre-trial (R. 21-24). Additionally, without waiting for appellee to introduce any evidence whatsoever, the Government furnished the testimony of both King and Faymonville. These individuals (1) had played prominent roles in the area of Soviet procurement under the Lend-Lease Program; (2) in the performance of their official duties had become thoroughly familiar with Soviet military needs; and (3) had discussed the intended use of the requisitioned equipment with Soviet officials. Indeed, Faymonville had been in charge of the American Supply Mission to the Soviet Union.

In these circumstances, it can be fairly said that, at the time of trial, appellee's knowledge of the intended use of the equipment by the Soviet Union was co-extensive with that of the Government. It knew just what the Government knew: that the Soviet Union had requisitioned the equipment to fulfill a critical military need and that the American officials responsible for the procurement program had honored the requisitions with that understanding.

2. *The land-grant rate.* In its brief (p. 13), appellee disputes the observation in our main brief that the court below had taken the test to be whether the shipped property, or the products thereof, were employed against the enemy. It suggests that, instead,

the court held that the shipments were not "military or naval property * * * moving for military or naval and not for civil use" because it did not believe that the entire economy of the Soviet Union was geared to the prosecution of the war.

We do not think that the court's opinion (R. 38-40) is susceptible of appellee's interpretation. The opinion states Judge Fee's belief that the nature of the Soviet economy was irrelevant—that the issue in litigation was whether the shipments were military property moving for a military use within the meaning of Section 321(a). And this question was resolved in the negative on the ground that "[t]here is very little indication in the record that any of this property ultimately was used on or near the battleground or that any of the products of any of the machinery ever were devoted to use against the common enemy" and that "[t]he government did not prove that any single article shipped or any single article or product of these machines actually was devoted to a war use." These observations were thereafter reiterated by the court in its findings of fact (which made no reference whatsoever to the Soviet economy) (R. 59-60).

In any event, what is of present significance is that appellee is in apparent agreement with the position taken in our main brief (pp. 23-28) that the only appropriate inquiry is into whether the property had an intended military use at the time that the rail movement took place. Accordingly, we turn now to appellee's contentions on the matter of what represents a military use.

Appellee's entire discussion is bottomed on the premise that the Government's theory is that the absence of a civil economy in the Soviet Union during World War II meant that all lend-lease shipments to that country of necessity were military in nature. As we think our main brief makes clear, this premise is erroneous.[1] What we have consistently urged, instead, is that, in determining whether particular shipments of lend-lease property were intended for military (as opposed to civil) use for the purposes of Section 321(a), reference must be made to the criterion of military use which was laid down by the Supreme Court in *Northern Pacific Ry. Co.* v. *United States*, 330 U.S. 248, and subsequently applied by this Court and the Court of Claims. That criterion was this [330 U.S. at 254-255]:

> Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under Section 321(a).[2]

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[1] Appellee will search in vain for a single reference in our main brief to the lack of a civil economy in the Soviet Union.

[2] Appellee dismisses (Br. p. 16) the *Northern Pacific* case on the ground that it did not involve shipments under the Lend-Lease Act. *United States* v. *Powell,* 330 U.S. 238, however, dispels any doubt that this distinction is without substance. In that case, which *did* involve lend-lease shipments,

As shown in more detail in our main brief (pp. 7-8, 36-39), the testimony of Faymonville and King reflected unmistakably that the shipments in this case were intended for either direct use by the Soviet armed forces or for the manufacture of materials for those armed forces—and thereby supported the statements of intended military use contained in the requisitions themselves. For example, the mobile power stations were to supply electricity to the Soviet army—not to some civilian agency engaged in producing articles for civilian consumption (R. 86-88). Similarly, both the hydroelectric and steel plants were intended for use in the manufacture of munitions, tanks and other implements of war which serve solely military purposes and hardly can be regarded as bolstering the over-all economy of a country (R. 86, 96-97, 102-103). Insofar as the petroleum refineries are concerned, King testified without contradiction that they were specially designed to produce that type of gasoline which was utilized in military aircraft alone (R. 123-126, 131).

In these circumstances, we fail to see the basis for appellee's assertions (Br. pp. 19, 21) (1) that "the shipments 'in common parlance' were civil and not military"; and (2) that the Government asks this Court "to apply the [land-grant] rates to commodities commonly used in civilian operations." The short of the matter is that in the "common parlance" of *all*

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the Court noted (330 U.S. at 247) that "in *Northern Pacific R. Co. v. United States, supra,* we develop more fully the breadth of the category of 'military or naval property' of the United States 'moving for military or naval use.' "

nations, the production of munitions and gasoline for combatant aircraft is deemed production for a military purpose, and not a conventional "civilian operation."

These considerations point up the inappropriateness of appellee's reliance on *United States* v. *Powell*, 330 U.S. 238. In *Powell*, decided the same day as *Northern Pacific*, the property was held by the Supreme Court to be moving for a civil use, within the meaning of Section 321(a), because the *Northern Pacific* test had not been met. The Court expressly noted that the fertilizer shipments there involved were destined for use by civilian agencies in the production of foodstuffs for civilian consumption, not for use either by the armed forces of Great Britain or by those civilian agencies of the British Government which directly served their needs. 330 U.S. at 247. There can be no question that the result in *Powell* would have been quite different had the shipments been foodstuffs for the use of the British army itself.

No more appropriate is appellee's reliance (Br. pp. 24-26) upon the various reports of the President to Congress on lend-lease operations. In none of those reports was there the slightest suggestion that the shipments were not intended for military use, within the meaning of *Northern Pacific*. It may well be that the property was described in the reports as industrial equipment—which, is, after all, precisely what most of it was. But, as appellee concedes (Br. p. 16), the *Northern Pacific* case involved shipments of bowling alleys, lumber, asphalt and other articles "which would [not] be classified as military." [3] We stress again

[3] See also the Court's observation that "[p]encils as well as rifles may be military property". 330 U.S. at 254.

that the test is not what the article *is*, but rather what use is intended to be made of it following the rail movement. And, the portions of the reports quoted by appellee (as well as the balance of those reports and the others in evidence) provide additional confirmation of the intent of both the United States and the Soviet Union that the shipments be used either by the Soviet army or in the fulfillment of that army's need for aviation gasoline, tanks and the like.[4]

3. *The export rate.* (a) In our main brief (pp. 39-45), we demonstrated that the notation "U.S.S.R." on the representative bill of lading (Exhibit 33) gave appellee all the information that the "specific destination" condition of Item 270(a) was designed to afford it—and that the addition of the port in the Soviet Union would have constituted mere surplusage. Nowhere in its brief does appellee attempt to refute that showing. Instead, it argues that the United States should be denied the export rate solely because the notation appeared under "Marks" on the bill of lading, instead of above the word "Destination".

This argument is, we submit, footless. Leaving aside the fact that Item 270(a) does not specify where, or in what manner, the overseas destination is to be shown on the bill of lading, appellee itself is well aware that the "U.S.S.R." notation in no circumstances could have been put where it now contends the government should have put the notation.

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[4] Exhibit 13, for example, shows the understanding of the Lend-Lease Administrator that the hydroelectric plants had been requisitioned to supply power to the new munitions plants in the Ural Mountain area.

Further, appellee cannot dispute in good conscience that the presence of the notation under "Marks", especially when taken in conjunction with the other statements on the bill of lading, plainly indicated to its agents that the overseas destination was the Soviet Union.

A bill of lading is, of course, a contract for the transportation of a shipment between certain points. As such, it must reflect, among other things, precisely where the movement is to begin and where it is to terminate. Thus, the standard government bill of lading reads in part:

> Received from .... by
> (Consignor)
> the .... the public
> (Name of Transportation Company)
> property hereinafter described, in good order and condition (content and value unknown) to be forwarded subject to conditions stated on the reverse hereof, from .... to
> (Shipping Point)
> .... by the said company
> (Destination)
> and connecting lines, there to be delivered in like good order and condition to ....
> (Consignee)
> ....
> Via ....
> (Route journey only when some substantial interest of the Government is subserved thereby)

In this case, the bill of lading destination was Portland, Oregon; *i.e.*, appellee and its connecting carriers had contracted only to deliver the shipment to the consignee at that port for exportation under a separate and distinct ocean bill of lading. As a

consequence, Portland was necessarily inserted in the space provided for the bill of lading destination.[5] And, in the space provided for the identification of the consignee, the following was inserted: "Soviet Government Purchasing Commission, c/o Moore & McCormack, Inc. 506 S.W. Sixth St."

Even if this had been all that had appeared in the bill of lading, appellee's agents would have been on at least some notice that the shipments were destined for the Soviet Union. It may be, as appellee suggests (Br. p. 35), that coal and oil were occasionally delivered to the Soviet Government under the Lend-Lease Program for the refueling of Soviet vessels in American ports. It is difficult to envisage, however, an American use to which the Soviet Government could have put armored, lead covered, copper electric cable (the commodity which was shipped under the representative bill of lading).

But the bill of lading did not call upon appellee to make any assumptions as to the eventual destination of the shipments. The "U.S.S.R." notation entered under "Marks" apprised appellee that each of the boxes in which the cable was packed had a destination marking of "U.S.S.R."—*i.e.*, that the cable was to be exported to that country after the rail movement terminated at Portland. Moreover, the bill of lading contained the additional notation "For export", as

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[5] Had "U.S.S.R." been substituted for "Portland", the initial carrier would obviously not have accepted the bill of lading. To have accepted it would have meant that the rail carriers would have been obliged to deliver the shipment to the Soviet Union.

well as the Office of Defense Transportation block permit number which indicated to appellee that ocean vessel space had already been allocated for transportation to the Soviet Union.

In the final analysis, then, appellee is endeavoring to deprive the Government of the export rate specified for export tariff to all points within the Soviet Union on shipments which: (1) were marked from the inception of the rail transportation with a Soviet Union destination; (2) were transported under bills of lading which referred to those destination markings and to the export character of the movement; and (3) were actually exported to the Soviet Union.

(b) Appellee also insists (Br. pp. 37-38, 42) that the Government is precluded from questioning the correctness of *Union Pacific* v. *United States*, 132 F. Supp. 230, in which the Court of Claims held—without discussing the point—that a notation similar to that here in issue was an insufficient showing of specific destination. In this connection, it points to the fact that (1) the Government did not file a petition for a writ of certiorari in the *Union Pacific* case; and (2) that the Fifth Circuit in *United States* v. *Missouri Pacific R. Co.*, 250 F. 2d 805, followed a decision of the Court of Claims in resolving one of the questions raised in that case.

We doubt that there are many, if any, circumstances in which the failure to seek Supreme Court review of an adverse decision in one court will operate to foreclose a litigant from challenging the correctness of that decision in a different case in another

court.[6] In any event, there is no warrant for resort to any such novel estoppel doctrine here. The Court of Claims determined in *Union Pacific* that there had been a failure of compliance with *a number* of the conditions contained in the export tariff. See our main brief, pp. 46-47. If the court was right in its conclusion respecting any *one* of these conditions, its ultimate conclusion that the Government was not entitled to the export rate would have been invulnerable to attack even if its conclusions as to *all* of the other conditions were erroneous.

Insofar as the *Missouri Pacific* case is concerned, the Fifth Circuit was there confronted with an entirely different issue from that here presented; namely, whether Section 322 deductions of overpayments on Commodity Credit Corporation shipments must be made by the Comptroller General within six years after the transportation services were performed. And while the court resolved the issue in the same way as had the Court of Claims in an earlier case, it did not do so because it believed that Court of Claims' decisions are entitled to conclusive weight. Rather, the Fifth Circuit made it plain [250 F. 2d at 808] that it had passed independent judg-

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[6] In quoting (Br. p. 38) from *Land* v. *Dollar*, 190 F. 2d 366 (C.A.D.C.), certiorari dismissed, 344 U.S. 806, appellee neglects to mention that there, as Judge Prettyman viewed it, the Government had sought to nullify a decree entered by the District of Columbia Circuit by obtaining an order from the District Court for the Northern District of California enjoining Dollar from obtaining compliance with that decree. In these circumstances, the quoted portions of the court's opinion have absolutely no pertinence here.

ment on the question and had concluded that the Court of Claims was right "for the *reasons* stated in that [court's] opinion." [Emphasis supplied.]

Since the Court of Claims stated no reasons in the *Union Pacific* case, it is impossible for this Court to ascertain what considerations led it to the conclusion that there was non-compliance with Item 270(a). One thing, however, is certain. If, as appellee suggests (Br. p. 37), the court was influenced by the requirement that a *uniform through export bill of lading* must show the overseas port of destination, that conclusion is entitled to no weight at all.

A through export bill of lading, although issued by a rail carrier, covers *both* the rail movement of the goods to the port of exportation and the ocean transportation thereafter to the overseas destination. It is for this reason that that type of bill of lading has a space for the insertion of the overseas port of destination—the participating carriers must know, of course, exactly where to deliver the shipment. Stated otherwise, the prescribed insertion of the port in a through export bill of lading has no relationship to the "specific destination" condition contained in Item 270(a)—which, as construed by the Interstate Commerce Commission, requires simply a showing (not necessarily on the bill of lading itself) that the shipments are bound for a destination west of the 170th Meridian, West Longitude, and east of the 30th Meridian, East Longitude. See our main brief, pp. 42-45.

(c) Finally, nothing in the *War Materials Reparation Cases*, 294 I.C.C. 5, supports appellee's assertion

(Br. pp. 39-41) that the Interstate Commerce Commission has decided the question here involved adversely to the Government.[7] Indeed, for the reasons set forth in our main brief (pp. 42-44), the Commission's decision in actuality supports the Government's position that the "U.S.S.R." notation constituted full compliance with Item 270(a).

CONCLUSION

For the reasons stated above, and in our main brief, it is respectfully submitted that the judgment below should be reversed.

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[7] Appellee's attempt to analogize the shipments in this case to those described in the portion of the Commission's opinion which is quoted (Br. pp. 40-41) disregards the fact that the former were destined for the Soviet Union, and space had been allocated for their ocean transportation to that country, before the rail movement began. See pp. 13-14, *supra*.

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